

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARCELLE DORSEY,

Petitioner,

Case No. 1:08-cv-18

v

HON. JANET T. NEFF

KENNETH McKEE,

Respondent.

OPINION

This is a habeas corpus petition filed pursuant to 28 U.S.C. § 2254. The matter was referred to the Magistrate Judge, who issued a Report and Recommendation, recommending that this Court deny the petition for the following reasons: (1) contrary to Petitioner's claim, the trial court did not allow the prosecution to introduce inculpatory hearsay statements in violation of Petitioner's right to confrontation and a fair trial; and (2) Petitioner's claim of good cause for failure to raise claims on direct appeal based on ineffective assistance of counsel and actual prejudice is without merit. The matter is presently before the Court on Petitioner's objections to the Report and Recommendation. In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections, approves and adopts the Report and Recommendation as the opinion of this Court, and issues this Opinion and Final Order pursuant to FED. R. CIV. P. 58.

Petitioner states two objections for this Court's review in Petitioner's "Motion of Objection to the Magistrates Report and Recommendation" filed on April 20, 2009 (Dkt 32).

First, Petitioner objects to the Magistrate Judge's analysis and conclusion that the out-of-court statement being challenged was not testimonial; and therefore, the admission of the statement was not a violation of the Confrontation Clause under *Crawford v. Washington*, 541 U.S. 36 (2004) (Obj. at 2; Rep. & Rec. at 10-12). Petitioner asserts that the Magistrate Judge erred in the application of *Davis v. Washington*, 547 U.S. 813 (2006), *Desai v. Booker*, 538 F.3d 424 (6th Cir. 2008), and *United States v. Franklin*, 415 F.3d 537 (6th Cir. 2005), to the facts of this case (Obj. at 2-5; Rep. & Rec. at 11-12). Petitioner cites *Bruton v. United States*, 391 U.S. 123 (1968), and *Douglas v. Alabama*, 380 U.S. 415 (1965), maintaining that the reliability of the challenged statement must be considered since the statement was made by a co-defendant (Obj. at 4-5).

Petitioner's argument is without merit. The Magistrate Judge properly concluded that the out-of-court statement is not testimonial in nature (Rep. & Rec. at 11-12). The Magistrate Judge did not err in applying *Davis*, *Desai*, and *Franklin* to the facts of this case. The Petitioner provides no basis from which to conclude that the challenged statement is testimonial in nature. The Magistrate Judge properly stated that Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements has been eliminated under *Crawford* (Rep. & Rec. at 12, n.3).

Second, Petitioner asserts that the Magistrate Judge erred in concluding that Petitioner failed to demonstrate good cause and prejudice to overcome the procedural bar for failing to raise the Confrontation Clause claim in his direct appeal (Obj. at 5-6). First, Petitioner maintains good cause has been shown because he was denied effective assistance of counsel when counsel failed to raise the Confrontation Clause issue on direct appeal. Second, Petitioner maintains his trial was

prejudiced by the admission of the out-of-court statements (Obj. at 6-7). Petitioner requests an evidentiary hearing to assist the Court in resolving these issues (Obj. at 6).

Petitioner's objection is misplaced and therefore without merit. The Magistrate Judge assumed good cause and determined Petitioner's claim on the merits (Rep. & Rec. at 13). The Magistrate Judge properly concluded that because there was no possible Confrontation Clause violation, Petitioner cannot show that he was prejudiced by appellate counsel's failure to raise that claim in the direct appeal (Rep. & Rec. at 14).

Having decided to approve and adopt the Magistrate Judge's Report and Recommendation as this Court's opinion, the Court must further determine pursuant to 28 U.S.C. § 2253(c) whether to grant a certificate of appealability as to the issues raised. The Court must review the issues individually. *Slack v. McDaniel*, 529 U.S. 473 (2000); *Murphy v. Ohio*, 263 F.3d 466, 466-67 (6th Cir. 2001).

"Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

Upon review of Petitioner's claims involving the Confrontation Clause and procedural default, this Court finds that reasonable jurists would not find the Court's assessment of Petitioner's claims debatable or wrong. A certificate of appealability is therefore denied.

A Final Order will be entered consistent with this Opinion.

Date: June 25, 2009

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

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FINAL ORDER

In accordance with the Opinion entered this date:

IT IS HEREBY ORDERED that the objections (Dkt 32) are DENIED and the Report and Recommendation of the Magistrate Judge (Dkt 31) is APPROVED and ADOPTED as the opinion of the Court.

IT IS FURTHER ORDERED that the petition for habeas corpus relief (Dkt 1) is DENIED for the reasons stated in the Report and Recommendation.

IT IS FURTHER ORDERED that a certificate of appealability pursuant to 28 U.S.C. § 2253(c) is DENIED as to each issue asserted.

Date: June 25, 2009

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge